SUPREME COURT, U. S.

MAR 12 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1246

VIRGINIA ELECTRIC AND POWER COMPANY,
a corporation,
Petitioner,

v.

CHARLES H. HADEN, II, TAX COMMISSIONER, ETC., REVIVED IN THE NAME OF RICHARD L. DAILEY, Tax Commissioner, etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM F. CARROLL
Assistant Attorney General
State of West Virginia
Room 26-E, State Capitol
Charleston, West Virginia 25305
Attorney for Respondent

Of Counsel

CHAUNCEY H. BROWNING, JR.
Attorney General
State of West Virginia
Room 26-E, State Capitol
Charleston, West Virginia 25305

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

TABLE OF CONTENTS

Page

REFERENCES TO WEST VIRGINIA STATUTES; TO THE PETITION; AND TO THE RECORD ... 1

ARGUMENT

1. THE PROCEDURES FOR ADMINISTRATIVE REVIEW OF DEFICIENCY TAX ASSESSMENTS AFFORDED BY THE WEST VIRGINIA STATUTES DO NOT DENY DUE PROCESS. ... 2

   a. Petitioner's claim of procedural due process violation is based solely upon the assumption of inherent unfairness. ... 2

   b. The West Virginia tax system in general; administrative and judicial review of deficiency assessments affords taxpayers full due process protection under the decisions of this Court. ... 4

   c. Petitioner failed to exhaust its administrative remedies; petition for writ of certiorari is premature. ... 11

2. THE DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED. ... 18

CONCLUSION ... 22

TABLE OF CASES

Page

Baldwin v. *Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244 (1931); 17

Beck v. *Missouri Valley Drainage Dist.*, 46 F.2d 632 (8th Cir. 1931), *cert. den.*, 284 U.S. 618, 52 S. Ct. 75, 76 L. Ed. 527; 17

Center for Participant Education v. *Marshall*, 337 F. Supp. 126 (N.D. Fla. 1972); 11

Danielley v. *City of Princeton*, 113 W.Va. 252, 167 S.E. 620 (1933); 15

Davidson v. *New Orleans*, 96 U.S. 97, 24 L. Ed. 616 (1878); 17

District of Columbia v. *Clawans*, 300 U.S. 617, 57 S. Ct. 660, 81 L. Ed. 843 (1937); 17

Federal Trade Com. v. *Cement Institute*, 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948); 10

Hannah v. *Larche*, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960); 4

Herman v. *University of South Carolina*, 341 F. Supp. 226 (D. S.C. 1971), *affirmed*, 457 F.2d 902 (4th Cir. 1972); 11

Hodges v. *Public Service Commission*, 110 W.Va. 649, 159 S.E. 834 (1931); 15

In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955); 9

Intercontinental Indus., Inc. v. *American Stock Exchange*, 542 F.2d 935 (5th Cir. 1971), *cert. den.*, 409 U.S. 842, 34 L. Ed. 2d 81, 93 S. Ct. 41 (1972); 11

Jenkins v. *McKeithen*, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969); 8

Kennecott Copper Corporation v. *F. T. C.*, 467 F.2d 67 (10th Cir. 1972) (U.S. App. pending); 10

Page

Lindsey v. *Normet*, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); 17

Lott v. *Pittman*, 243 U.S. 588, 37 S. Ct. 473, 61 L. Ed. 915 (1917); 17

Luckenbach S.S. Co. v. *United States*, 272 U.S. 533, 47 S. Ct. 186, 71 L. Ed. 394 (1926); 17

McMillen v. *Anderson*, 95 U.S. 37, 24 L. Ed. 335 (1877); 17

Murray's Lessee v. *Hoboken Land & Improvement Co.*, 18 How. 272 (Vol. 59 U.S.), 15 L. Ed. 372 (1856); 17

Offutt v. *United States*, 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954); 9

Ogletree v. *McNamara*, 449 F.2d 93 (6th Cir. 1971); 11

Ohio ex rel. Bryant v. *Akron Metropolitan Park Dist.*, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710 (1930); 17

Ortwein v. *Schwab*, ... U.S. ....., 93 S. Ct. ....., 35 L. Ed. 2d 572 (1973); 17

Owens-Illinois Glass Company, et al. v. *Battle, State Tax Commissioner*, 151 W.Va. 655, 154 S.E.2d 854 (1967); 19

Richardson v. *Perales*, 402 U.S. 389, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971); 8, 9, 10, 16

Sims v. *Fisher*, 125 W.Va. 512, 25 S.E.2d 216 (1943); 15

Tietze v. *Richardson*, 342 F. Supp. 610 (S.D. Tex. 1972); 11

United States v. *Litton Industries, Inc.*, 462 F.2d 14 (9th Cir. 1972); 10, 11

Utah Power and Light Company v. *Pfost*, 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932); 21

Page

Virginia Electric & Power Co. v. *Haden*, 200 S.E.2d 848 (W.Va. 1973); 2, 16

Walter Butler Building Co. v. *Soto*, 142 W.Va. 616, 97 S.E.2d 275 (1957); 15

Winnick v. *Manning*, 460 F.2d 545 (2d Cir. 1972); 11

Wisconsin v. *J. C. Penney Co.*, 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed. 267 (1940); 3

STATUTES

Chapter 6, Article 7, Section 2a, West Virginia Code of 1931, as amended; 5, 9

Chapter 11, Article 1, Section 1, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 11, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 11, Section 21, West Virginia Code of 1931, as amended; 6

Chapter 11, Article 12, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 12A, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 13, West Virginia Code of 1931, as amended; 5, 6, 14, 19

Chapter 11, Article 13, Section 2, West Virginia Code of 1931, as amended; 18, 19

Chapter 11, Article 13, Section 2a, West Virginia Code of 1931, as amended; 14

Chapter 11, Article 13, Section 2b, West Virginia Code of 1931, as amended; 14, 18, 21

Chapter 11, Article 13, Section 2c, West Virginia Code of 1931, as amended; 22

Chapter 11, Article 13, Section 2d, West Virginia Code of 1931, as amended; 21

Chapter 11, Article 13, Section 7, West Virginia Code of 1931, as amended; 12

Chapter 11, Article 13, Section 7b, West Virginia Code of 1931, as amended; 6, 7

Chapter 11, Article 13, Section 8, West Virginia Code of 1931, as amended; 14

Chapter 11, Article 14, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 14A, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 15, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 15A, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 17, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 19, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 21, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 21, Section 82, West Virginia Code of 1931, as amended; 6

Chapter 11, Article 24, West Virginia Code of 1931, as amended; 5

Chapter 51, Article 2, Section 13, West Virginia Code of 1931, as amended; 9

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Article I, Section 8 (the Commerce Clause); 20, 21

West Virginia Constitution, Article V, Section 1. 15

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1246

VIRGINIA ELECTRIC AND POWER COMPANY,
a corporation,
Petitioner,

v.

CHARLES H. HADEN, II, TAX COMMISSIONER, ETC., REVIVED IN THE NAME OF RICHARD L. DAILEY, Tax Commissioner, etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION

REFERENCES TO WEST VIRGINIA STATUTES; TO THE PETITION; AND TO THE RECORD

The tax statutes of the State of West Virginia are incorporated in Chapter 11, West Virginia Code of 1931, as amended, divided into various articles. References in this brief to a particular article will be by Code 11-__. References to a particular section of an article will be by Code 11-__-__. For example, reference to Chapter 11, Article 13, Section 2b, will be Code 11-13-2b. Reference

to any other chapter, article, and section of said Code will be by Code ---.

References to the petition for writ of certiorari will be made herein as P. ---.

References to the record and to exhibits in the record will be made pursuant to Rule 40 of the Court.

ARGUMENT

1.

THE PROCEDURES FOR ADMINISTRATIVE REVIEW OF DEFICIENCY TAX ASSESSMENTS AFFORDED BY THE WEST VIRGINIA STATUTES DO NOT DENY DUE PROCESS, AND PETITIONER WAS NOT, ON THE RECORD, DENIED ANY CONSTITUTIONAL RIGHT BY THE RESPONDENT OR BY THE DECISION OF THE COURT BELOW.

a. Petitioner's claim of procedural due process violation is based solely upon the assumption of inherent unfairness.

In urging this Court to grant certiorari the petitioner maintains, in essence, that the West Virginia system establishing administrative review by the State Tax Commissioner of his deficiency tax assessments is constitutionally unfair.

Petitioner argues, P. 10 through 15, that it was denied constitutional due process of law by the decision complained of, *Virginia Electric & Power Co.* v. *Haden*, reported in 200 South Eastern Reporter, 2nd Series, pp. 848 through 858 (W.Va. 1973). Denial of due process of law is posited in this language, P. 10:

> "The Court below held that a hearing upon appeal of the administrative decision of the State Tax Commissioner is limited to a judicial review upon

> the record. As a result, the administrative hearing held by the Tax Commissioner becomes the trial, the place where the evidence is introduced, *and the dual role of the State Tax Commissioner, as an adversary party and as the hearing officer, denies petitioner due process of law.*" (Emphasis supplied.)

Petitioner expands the basic assumption of denial of constitutional due process to embrace all tax collection activities of the West Virginia Tax Commissioner, P. 13:

> "*The Tax Commissioner's duties as the tax collector for the State are inherently in conflict with the adjudicatory function involved in passing upon the correctness of a tax assessment made by him.*
>
> * * *
>
> "*The West Virginia system, as judicially construed, is plainly inadequate.* Moreover, it cannot be said that the defects of this patently unfair administrative adjudicatory process are cured by subsequent judicial review of the tax administrator's decision (made on the administrative record)." (Emphasis supplied.)

However, the Constitution of the United States is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed. 267 (1940), at page 270 (L. Ed.). This Court has described constitutional due process as "an illusive concept"; its exact boundaries undefined and its content varied according to specific factual contexts. When governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally

been associated with the judicial process. *Hannah* v. *Larche*, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960). The Court indicated its basic approach to due process in *Hannah* v. *Larche, supra,* at p. 1321 (L. Ed. 2d) of the opinion:

> "* * * Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. * * *."

This Court holds that inasmuch as the requirements of due process frequently vary with the type of proceeding involved, it is, therefore, necessary at the outset to ascertain both the nature and function of the administrative agency involved. *Hannah* v. *Larche, supra,* at p. 1320 (L. Ed. 2d).

b. The West Virginia tax system in general; administrative and judicial review of deficiency assessments affords taxpayers full due process protection under the decisions of this Court.

The respondent, Tax Commissioner, is the chief executive officer of the State Tax Department. He is appointed by the governor by and with the advice and consent of the State Senate, to serve at the will and pleasure of the governor for the term for which the governor was elected and until a successor has been appointed and qualified, and has control and supervision of the State Tax Department and responsibility for the work of each of its divisions. The Tax Commissioner's salary is fixed by statute.

See Code 11-1-1, Code 6-7-2a. The Tax Commissioner has only certain administrative duties relative to the assessment of ad valorem taxes, the assessment and collection whereof being the duties of county assessors and sheriffs. Revenue from ad valorem taxation is dedicated to the county-based free school system, and to city and county governments.

For the reason that only one third of one percent of its total revenue is derived from property taxation, West Virginia is completely dependent, for tax generated revenue, upon a system of excises which it is the statutory responsibility of the Tax Commissioner to administer. These taxes are the Inheritance and Transfer Tax (Code 11-11); the Business Franchise Registration Certificate Tax (Code 11-12); the Annual Tax on Incomes of Certain Carriers (Code 11-12A); the Business and Occupation Tax (Code 11-13); the Gasoline and Special Fuel Excise Tax (Code 11-14); the Motor Carrier Road Tax (Code 11-14A); the Consumers Sales Tax (Code 11-15); the Use Tax (Code 11-15A); the Cigarette Tax (Code 11-17); the Soft Drinks Tax (revenues dedicated to the support of the State's only medical and dental schools) (Code 11-19); the Personal Income Tax (Code 11-21) and the Corporation Net Income Tax (Code 11-24).

In fiscal year 1972-1973 the revenue collected by virtue of the statutes cited above approximated $454,530,955.52 and comprised 37.20% of the total State revenue of $1,221,809,569.05. If funds from federal sources are excluded from the latter figure, these tax measures generated 53.82% of the State's total revenue for fiscal year 1972-1973.

Except for the Inheritance and Transfer Tax, in which case the taxpayer's appeal from a deficiency assessment

is made directly to the circuit court of the county in which the property transferred or the greater portion thereof may be located (Code 11-11-21), and the Personal Income Tax, which affords the taxpayer an opportunity to obtain judicial review of a proposed deficiency in advance of the actual assessment of tax (Code 11-21-82), each of the above cited tax statutes provides for administrative review by the Tax Commissioner of his deficiency assessment of the particular tax involved followed by the judicial appeal from his decision made upon such review.

Although identical language is not employed in every article, each contains sections empowering the Tax Commissioner to make deficiency assessments of the tax levied in the article upon his own investigation indicating taxes due; requiring the service of notice thereof upon the taxpayer, who may respond by filing with the Tax Commissioner a petition or other notice of protest of the assessment. The petition will come on for hearing before the Tax Commissioner, or his designated examiner at which time evidence for and against the assessment may be introduced by the Tax Commissioner and by the taxpayer. Subsequent to the hearing, within a reasonable time, the Tax Commissioner is required to render and serve upon the taxpayer his decision affirming or dismissing the assessment in whole or in part. A taxpayer disagreeing with such decision may appeal it to an appropriate circuit court. Typical of such language is that contained in Code 11-13-7b, the statute challenged in this proceeding, which sets forth the provisions for administrative review of deficiency assessments of the Business and Occupation Tax (Code 11-13). Code 11-13-7b is here quoted in full as follows:

> "The tax commissioner shall give to the taxpayer written notice of any assessment made pur-

suant to this article. Unless the taxpayer to whom a notice of assessment is directed shall, within thirty days after service thereof (except in the case of jeopardy assessments), either personally or by certified mail, file with the tax commissioner a petition in writing, verified under oath by said taxpayer or his duly authorized agent, having knowledge of the facts, setting forth with definiteness and particularity the items of the assessment objected to, together with the reason for such objections, said assessment shall become and be deemed conclusive and the amount thereof shall be payable at the end of the thirty-day period. In every case where a petition for reassessment as above described is filed, the tax commissioner shall assign a time and place for the hearing of same and shall notify the petitioner of such hearing by written notice at least twenty days in advance thereof and such hearing shall be held within sixty days from the filing of the petition for reassessment unless continued by agreement or by the tax commissioner for good cause. The hearing shall be informal and may be conducted by an examiner designated by the tax commissioner. At such hearing evidence may be offered to support the assessment or to prove that it is incorrect. After such hearing the tax commissioner shall, within a reasonable time, give notice in writing of the decision. Unless an appeal is taken within thirty days from service of this notice, the tax commissioner's decision shall be final."

The inherent fairness of this statute, petitioner's assertions to the contrary, is obvious. It will be observed that (1) no action can be taken against a taxpayer's interest without advance notice to him; (2) the taxpayer has the unlimited right to present any defense which he has to the deficiency assessment; (3) the taxpayer is not restricted in the mode of his attack on the deficiency assessment or in his administrative presentation thereof, except

that his petition must assert with definiteness and particularity the items of the deficiency assessment to which he objects, together with the reason for such objections (in practice petitions are frequently amended to provide objections additional to or differing from those first stated); (4) no limitations are placed upon the kind or quantity of the taxpayer's evidence which he may introduce in opposition to the deficiency assessment, whether documentary or presented in the form of oral testimony or otherwise; (5) no limitations are placed upon the taxpayer's right to examine and object to any of the Tax Commissioner's evidence or to examine and cross examine the Tax Commissioner's witnesses; (6) hearings may be continued (in practice, continuances are frequent). See *Jenkins* v. *McKeithen*, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969).

The statutory specification of informal hearings evidences the intent of the West Virginia Legislature that taxpayers be afforded maximum latitude in presenting defenses to deficiency tax assessments and this result has obtained in practice. See *Richardson* v. *Perales*, 402 U.S. 389, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971), at p. 352 (L. Ed. 2d). Recordation of hearings is frequent, depending, in the usual instance, upon the multiplicity of issues and evidence.

Petitioner at P. 14 states that the hearing procedure is defective for the reason, among others, that it "must be conducted in haste." It is noteworthy that the deficiency assessment with which the present case is concerned was issued on the 8th day of August, 1967, R. 117; the hearing thereon was held on the 1st day of November, 1967, R. 117; the administrative decision following the hearing was issued on the 5th day of May, 1969, R. 125, a space of almost two years.

The comment should also be made that the Tax Commissioner is not dependent for his remuneration upon the amount of tax which he collects. His salary is taken from the State Treasury and is fixed by statute. See Code 6-7-2a. The salaries of circuit judges are likewise fixed by statute and paid from the State Treasury. See Code 51-2-13.

The matter comes down to the question of the procedure's integrity and fundamental fairness. *Richardson* v. *Perales, supra.* Moreover, these statutes do not, as petitioner maintains, compel the Tax Commissioner to act as an adversary party as well as hearing officer in his administrative review of deficiency tax assessments. The statutes contemplate that the Tax Commissioner function as an adjudicator and fact gatherer, not as an adversary. The Tax Commissioner's efforts in the present case to provide petitioner with procedural due process (discussed in detail *infra*) afford ample evidence that the statutory role as adjudicator in the review proceeding has been accepted.

This Court has, in *Richardson* v. *Perales, supra*, emphatically refused to accept the thesis that there exists an inherent bias, *per se*, on the part of administrators, thereby rendering them naturally favorable to the government's case in deciding contested matters. In that case a claimant attacked the hearing procedure of the Social Security Act on due process grounds, maintaining that since the hearing examiner had the responsibility for gathering the evidence and to make the government's position as strong as possible, he naturally leaned toward a decision in favor of the evidence he has gathered. For this proposition claimant cited *Offutt* v. *United States*, 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954) and *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942

(1955), two cases relied on by petitioner in the instant proceeding. The Court rejected claimant's due process argument in strong language, pp. 857, 858 (L. Ed.) of the opinion:

> "Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts. The 44.2% reversal rate for all federal disability hearings in cases where the state agency does not grant benefits, M. Rock, An Evaluation of the SSA Appeals Process, Report No. 7, U. S. Department of HEW, p 9 (1970), attests to the fairness of the system and refutes the implication of impropriety."

The significance of the language is very clear. This Court will not overthrow a vital administrative review system on the mere imputation of due process violations. Lack of fairness in the actual conduct of the proceeding must be clearly demonstrated.

The principle is firmly established by the decisions of this Court and of the lower federal courts that the combination of investigative and judicial functions within an administrative agency does not, of itself, violate due process of law. Accordingly, the foundation of petitioner's contention that it was denied due process by the procedures contained in the applicable statutes and by the decision of the court below must fall. *Federal Trade Com.* v. *Cement Institute*, 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948), at p. 1035; *Kennecott Copper Corporation* v. *F. T. C.*, 467 F.2d 67 (10th Cir. 1972) (U.S. App. pending); *United States* v. *Litton Industries, Inc.*,

462 F.2d 14 (9th Cir. 1972); *Winnick* v. *Manning*, 460 F.2d 545 (2d Cir. 1972); *Intercontinental Indus., Inc.* v. *American Stock Exchange*, 452 F.2d 935 (5th Cir. 1971), *cert. den.*, 409 U.S. 842, 34 L. Ed. 2d 81, 93 S. Ct. 41 (1972); *Ogletree* v. *McNamara*, 449 F.2d 93 (6th Cir. 1971); *Herman* v. *University of South Carolina*, 341 F. Supp. 226 (D. S.C. 1971), *affirmed*, 457 F.2d 902 (4th Cir. 1972); *Tietze* v. *Richardson*, 342 F. Supp. 610 (S.D. Tex. 1972); *Center for Participant Education* v. *Marshall*, 337 F. Supp. 126 (N.D. Fla. 1972).

c. Petitioner failed to exhaust its administrative remedies: petition for writ of certiorari is premature.

From the standpoint of factual development, the controversy between the petitioner and the respondent, Tax Commissioner, remains as it was at the beginning of the review process except that the Tax Commissioner's determination that the manufactured electric power was subject to taxation was affirmed by the court below and his determination that the produced limestone was subject to taxation was rejected by that court.

The petition for writ of certiorari itself demonstrates that review by this Court is premature. The salient feature of the petition is that it contains no allegation that petitioner was denied the right to submit any evidence at the administrative level on the question of value of the manufactured electric power or that the evidence which it did submit was rejected or was not considered by the Tax Commissioner or by the West Virginia Supreme Court of Appeals, or that such evidence was excluded from the administrative record of the proceedings compiled by the Tax Commissioner for submission to the circuit court. The reason that no such allegation is made is that *petitioner introduced no evidence of its own*

respecting the value of the electricity at the administrative hearing or at any time thereafter. Accordingly, petitioner has not exhausted its administrative remedies.

Code 11-13-7 provides that if the Tax Commissioner believes that Business and Occupation Tax has not been sufficiently reported by a taxpayer, he may investigate and determine or estimate the tax liability and make a deficiency assessment therefor. In order that such assessment be made, in this case, an initial determination of the value to be placed on the manufactured electric power was necessary. The administrative review procedures are for the purpose of determining the correctness of the deficiency assessment. A vital aspect of such review in this case was a proper value attributable to the electric power. The Tax Commissioner was thus deprived at the administrative level by the petitioner of any contribution which it could have made toward resolution of this problem. Since the petitioner did not offer evidence of its own at the administrative level on the value of the manufactured electric power, the only evidence in the record on that point was supplied by the Tax Commissioner as the result of his own investigation. See Stipulation R. 51 at 52; R. 135; Exhibit F to Stipulation R. 79 at 88, 89, 90; R. 135. The administrative decision shows that objections to certain factual matters were raised at the administrative level by the petitioner, and were resolved in its favor. Exhibit I to Stipulation R. 117 at 120; R. 135. However, the decision is silent regarding any evidence advanced by petitioner on the value of the electric power. The first submission by petitioner in this area was the unsupported allegation made in its "Notice of Appeal and Appeal from Decision of the State Tax Commissioner Affirming in Part Assessment of Business and Occupation Taxes and Penalties" to the Circuit Court

of Grant County. R. 1 at 5. At the administrative level, petitioner's efforts were almost entirely directed to resolution of the legal questions posed by the deficiency tax assessment, *i.e.* (1) that as a public utility petitioner was not subject to taxation on the manufactured electric power and (2) petitioner was not subject to taxation as a producer of limestone.

The Tax Commissioner took note of the allegation contained in petitioner's "Notice of Appeal and Appeal from Decision of the State Tax Commissioner Affirming in Part Assessment of Business and Occupation Taxes and Penalties" to the Circuit Court that petitioner had not been afforded an opportunity to be heard, administratively, on the Tax Commissioner's evidence (procured from the West Virginia Public Service Commission) on the question of value of the manufactured electric power. R. 1 at 7. Realizing that the original assessment had been issued and the administrative hearing thereon conducted by a predecessor Tax Commissioner, which proceedings had occurred some time prior to the issuance of the administrative decision and that petitioner's allegation might have merit, *the Tax Commissioner fulfilling his statutory role of adjudicator* in reviewing deficiency tax assessments, took the position that the administrative decision had been, through inadvertence on his part, issued prematurely. Accordingly, the Tax Commissioner sought to withdraw the decision from the circuit court in order to conduct a further administrative hearing on the question of value of the manufactured electric power and the value of the produced stone and to permit "the taxpayer *to introduce evidence* (emphasis supplied) and examine the State's evidence" respecting these items. See Defendant's Exhibit A entitled "Notice of Withdrawal of Administrative Decision" R. 15; R. 23 and the

Tax Commissioner's "Plea in Abatement and Motion to Dismiss and Remand" R. 10 at 12; R. 23. The attempt by the Tax Commissioner to withdraw his administrative decision was resisted by petitioner in the circuit court. See plaintiff's "Motion to Strike that Certain Pleading of the Defendant's Entitled 'Plea in Abatement and Motion to Dismiss and Remand' " R. 25; R. 39 wherein the allegation was made that such action on the part of the Tax Commissioner runs "afoul of basic fundamental due process guarantees of the Constitution" R. 27. The circuit court refused to permit remand to the Tax Commissioner for further hearing and asserted its jurisdiction to try the case in full by order dated December 31, 1969 R. 43 as corrected by order of January 5, 1970 R. 47. By order of October 3, 1970, R. 49 the circuit court limited the issues to be tried to: (1) whether petitioner was taxable as a manufacturer of electric power under Code 11-13-2b and (2) whether petitioner was taxable as a producer of stone within the meaning of Code 11-13-2a. All orders were signed by counsel for the parties. Thus, the questions of product values were not submitted to nor decided by the circuit court nor by the West Virginia Supreme Court of Appeals. These matters were specifically left open for further consideration. See Stipulation R. 51 at 57; R. 135.

Code 11-13-8 provides for appeal to the appropriate circuit court from administrative decisions of the Tax Commissioner, rendered after hearing, which hold taxpayers liable for Business and Occupation Taxes imposed by Code 11-13, the Business and Occupation Tax. This statute defines the duty of the circuit courts as follows:

> "The court shall hear the appeal and determine anew all questions submitted to it on appeal from the determination of the tax commissioner."

This language was analyzed in depth by the West Virginia Supreme Court of Appeals in *Walter Butler Building Co.* v. *Soto,* 142 W.Va. 616, 97 S.E.2d 275 (1957), and it was there held that the circuit courts were empowered only to review and determine judicial questions such as the validity of the assessment of tax and the applicability of the taxing statute to the particular taxpayer. The effect of the Court's decision was that, in the judicial review of an administrative proceeding evidence not originally considered by the administrative agency could not, for the first time, be presented to the courts. The rationale of the opinion was founded on Article V, Section 1 of the West Virginia Constitution which requires that the legislative, executive and judicial departments of the State government be separate and distinct, and interdicts the exercise by any one of the three governmental branches of the powers properly belonging to either of the others. Accordingly, the Court has consistently ruled that administrative bodies are part of the executive branch of State government and that their proceedings, including the gathering and consideration of evidence, being functions of the executive branch, the jurisdiction of courts, in reviewing administrative evidentiary rulings, is limited to those matters which were actually considered, or should or should not have been considered by the agency. See in accord: *Hodges* v. *Public Service Commission*, 110 W.Va. 649, 159 S.E. 834 (1931); *Sims* v. *Fisher,* 125 W.Va. 512, 25 S.E.2d 216 (1943); *Danielley* v. *City of Princeton*, 113 W.Va. 252, 167 S.E. 620 (1933). Thus, the West Virginia Supreme Court of Appeals in ruling that the Tax Commissioner must, in the first instance, have the opportunity to examine all of the facts pertinent to the proceeding before him was, in the decision below, following long established

precedent in this jurisdiction. The Court in ruling that the circuit court must (1) decide the case on the evidence in the record as it was received by that court or (2) return the case to the Tax Commissioner for further evidentiary development demonstrated its cognizance of due process requirements in this language found in 200 S.E.2d at page 853:

> "* * * In the instant case justice dictates that the taxpayer be afforded an opportunity to offer its evidence as to values and that the court be empowered, if the circumstances warrant, to remand the case so that this opportunity may be afforded."

Even the petitioner admits P. 15 that "Upon the remand of this case, the Tax Commissioner can and presumably will correct the procedural error occurring upon the first administrative hearing."

Petitioner's quarrel with the respondent, Tax Commissioner, and with the decision of the West Virginia Supreme Court of Appeals is founded on the Court's refusal to permit petitioner to by-pass the Tax Commissioner. The position of the West Virginia Court is that the Tax Commissioner should have, under the applicable statute, the opportunity to pass upon all relevant evidence in matters before him in order that an informed administrative decision can be made for review by the courts; that individuals contesting cases before the Tax Commissioner may not make the decision as to what essential evidence they will offer to the Tax Commissioner and what they may reserve exclusively for consideration in the first instance by the reviewing court. See in accord *Richardson* v. *Perales*, *supra*.

Petitioner insists that due process of law cannot be afforded administratively; that the Federal Constitution

requires that it be permitted to present vital evidence to the reviewing court which was never offered to the Tax Commissioner. It is well settled, however, by the decisions of this Court that the right of appeal or review is not essential provided due process has already been accorded in the tribunal of first instance. Due process of law does not, in all cases, require resort to a court of justice to assert the rights of the public against the individual or to impose burdens on his property for the public use. *Davidson* v. *New Orleans*, 96 U.S. 97, 24 L. Ed. 616 (1878); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (Vol. 59 U.S.), 15 L. Ed. 372 (1856); *McMillen* v. *Anderson*, 95 U.S. 37, 24 L. Ed. 335 (1877); *District of Columbia* v. *Clawans*, 300 U.S. 617, 57 S. Ct. 660, 81 L. Ed. 843 (1937); *Baldwin* v. *Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244 (1931); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist.*, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710 (1930); *Luckenbach S.S. Co.* v. *United States*, 272 U.S. 533, 47 S. Ct. 186, 71 L. Ed. 394 (1926); *Lott* v. *Pittman*, 243 U.S. 588, 37 S. Ct. 473, 61 L. Ed. 915 (1917); *Beck* v. *Missouri Valley Drainage Dist.*, 46 F.2d 632 (8th Cir. 1931), *cert. den.*, 284 U.S. 618, 52 S. Ct. 75, 76 L. Ed. 527; *Lindsey* v. *Normet*, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); *Ortwein* v. *Schwab*, ... U.S. ....., 93 S. Ct. ....., 35 L. Ed. 2d 572 (1973).

Full opportunity for procedural due process in the first instance is, and remains, available to the petitioner in this case. Accordingly, the petition for writ of certiorari should be denied.

2.

THE DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

The Business and Occupation Tax is imposed by Code 11-13-2, which reads in pertinent part as follows:

> "There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined *by the application of rates against values or gross income* as set forth in sections two-a to two-j [§§ 11-13-2a to 11-13-2j], inclusive, of this article." (Emphasis supplied.)

The provision of the Business and Occupation Tax statute at issue in this case is Code 11-13-2b which prescribes the rate of tax to be paid by persons engaged within the State in the business of manufacturing, compounding or preparing products for sale, profit or commercial use. Code 11-13-2b provides in pertinent part as follows:

> "Upon every person engaging or continuing *within this State in the business of manufacturing*, compounding or preparing for sale, profit, or commercial use, either directly or through the activity of others in whole or part, *any article or articles, substance or substances, commodity or commodities, or electric power not produced by public utilities taxable under other provisions of this article, the amount of the tax to be equal to the value of the article*, substance, commodity *or electric power manufactured*, compounded or prepared for sale, *as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same, except as otherwise provided*, multiplied by a rate of four tenths of one per cent. The measure of this tax is the value of the entire product manufactured,

> compounded or prepared in this State for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the State. * * *." (Emphasis supplied.)

Code 11-13-2 provides for the computation of value, for purposes of the tax, in instances where goods manufactured in the State are transported from and sold outside West Virginia:

> *"If any person liable for any tax under sections two-a or two-b* [§ 11-13-2a or 11-13-2b] *shall ship or transport his products or any part thereof out of the State without making sale of such products, the value of the products in the condition or form in which they exist immediately before transportation out of the State shall be the basis for the assessment of the tax imposed in said sections,* except in those instances in which another measure of the tax is expressly provided. *The tax commissioner shall prescribe equitable and uniform rules for ascertaining such value."* (Emphasis supplied.)

All sections of Code 11-13 are to be read and considered in pari materia. *Owens-Illinois Glass Company, et al.* v. *Battle, State Tax Commissioner,* 151 W.Va. 655, 154 S.E.2d 854 (1967).

The significant features of the quoted sections as they refer to this case are: (1) the tax is imposed upon persons engaged within the State in the business of manufacturing; (2) the measure of the tax is the value of the entire product within West Virginia; (3) the tax is not imposed upon the sale of anything; (4) reference to proceeds of sale as an indicator of value occurs only when the product is sold within West Virginia; (5) in instances where the product is transported out of West Virginia

for sale in another state value is measured by product worth as it existed immediately prior to such transportation; and (6) the tax does not include sales value at the place of sale outside West Virginia or any value attributable to the product from activities in another state.

The Tax Commissioner recognized that the tax computation was limited by the statute, as well as by the Commerce Clause, Constitution of the United States, Article I, Section 8, to the value of the manufactured electric power within West Virginia and before transmission out of the State. See the Administrative Decision, Exhibit I to Stipulation R. 117 at 123;

> "Ancillary to the legal issue hereinbefore determined is the measure or value of the generated electric power to be used in determining the liability of such manufacturer under Section 2b. In this regard, any proper determination must turn upon the duty placed upon the Tax Commissioner to look to gross proceeds from sales of similar products between buyers and sellers not having a common interest and as controlled by Regulation BOT 6.52, which is applicable *where value is to be determined in the absence of sale within this State.* * * *." (Emphasis supplied.)

The West Virginia value of petitioner's manufactured electric power was obtained, administratively, by the examination of records of sales by Monongahela Power Company, a West Virginia public utility, made to its West Virginia utility customers located in the same general vicinity as petitioner's West Virginia utility customers. See Exhibit F to Stipulation, R. 79 at 88, 90; R. 135. The West Virginia Supreme Court of Appeals, in holding that petitioner should have the opportunity to present evidence as to the West Virginia value of the electric power, at the administrative level also evidenced

its recognition that value was not to be attributed to out of state activities of petitioner.

Many years ago this Court ruled in *Utah Power and Light Company* v. *Pfost*, 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932), that a state license tax on the generation of electricity does not, as laid upon electricity transmitted to consumers in another state, impose an unconstitutional burden on interstate commerce. The rationale of the decision was that since commerce does not begin until manufacture is finished, the Commerce Clause of the Federal Constitution does not prevent a state from exercising exclusive control over manufacture. The decision of the West Virginia Supreme Court of Appeals followed *Utah Power and Light Company* v. *Pfost, supra.*

Petitioner engages in West Virginia in the business of a public utility. A small portion of the electric power which it manufactured during the tax years was sold by petitioner to its utility customers within the State. Petitioner was subject to and paid tax on such sales under Code 11-13-2d, which prescribes the tax rate to be paid by persons engaged in the utility business within the State. Petitioner paid no tax whatever on the balance of the manufactured electric power, being approximately 91% of the total production, which it sold outside the State, taking the position that having paid tax under Code 11-13-2d on its West Virginia utility sales, the language contained in Code 11-13-2b "or electric power not produced by public utilities taxable under other provisions of this article" exempted it from payment of any tax under the manufacturing classification set forth in Code 11-13-2b as to that portion of its electric power which was not sold as a utility in West Virginia.

That issue having been decided against it by the decision below, the petitioner now argues P. 19 that because

most of its manufactured electric power is transmitted out of West Virginia and sold in other states, the West Virginia Supreme Court of Appeals has, in effect, imposed a tax upon it merely because the electricity is sold outside the State.

When it is considered that the tax is laid upon the act of manufacturing, not the act of selling (which is a separate business activity taxable under Code 11-13-2c and not applicable to petitioner) the argument presupposes a complete misreading of the applicable statute, the administrative decision and the decision of the West Virginia Court. The decision affords ample assurance that the place of sale of the electric power or its sales price held no significance whatever for the Court.

Accordingly, respondent submits that no substantial federal question is presented by the petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

WILLIAM F. CARROLL
Assistant Attorney General
State of West Virginia
Attorney for Respondent

Of Counsel
CHAUNCEY H. BROWNING, JR.
Attorney General
State of West Virginia